

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2007-0015, State of New Hampshire v. Kerwin D. Dimitroff, the court on January 31, 2008, issued the following order:**

The defendant, Kerwin Dimitroff, appeals his convictions for felonious sexual assault. He argues that the trial court erred in admitting: (1) testimony about findings made by the divorce court in his divorce proceedings; and (2) two photographs of the victim taken when she was a child. We reverse and remand.

Absent an unsustainable exercise of discretion, we will affirm a trial court's ruling on the admissibility of evidence. State v. Cook, 148 N.H. 735, 741 (2002).

The defendant argues that the trial court erred in admitting evidence about findings made in a separate divorce proceeding between the defendant and the victim's mother. The defendant and the State agree that the trial court based its ruling upon the doctrine of specific contradiction. See State v. Morrill, 154 N.H. 547, 549-50 (2006) (doctrine of specific contradiction applies when one party introduces evidence that provides justification beyond mere relevance for opponent's introduction of evidence that may not otherwise be admissible).

The specific evidence to which the defendant objects is testimony that the divorce court approved 102 of the 110 findings and rulings requested by the victim's mother. This evidence was admitted after the victim's mother testified under questioning by defense counsel that she had filed a pleading in the divorce proceeding in which she averred that the defendant had sexually abused the victim for many years. She admitted in further testimony, however, that she did not know much about the abuse or how long it had occurred. For the doctrine of specific contradiction to apply, the initial evidence must have created a misimpression or misled the fact-finder in some way. See *id.* at 551. We will assume without deciding that a misimpression was created by defense counsel's questions about the veracity of the divorce decree pleading. Nevertheless, it was not enough to permit wholesale admission of the findings and rulings made by a separate court in a separate proceeding on a range of issues, many of which were not relevant to the criminal trial, especially where, as here, the effect of the evidence was to suggest, by inference, that the divorce court found the witness credible. See *id.* at 550 (fact that door has been opened does not permit all evidence to pass through).

The defendant also argues that the admission of two photographs of the victim taken when she was approximately nine years old was unduly prejudicial. The State contends that the defendant failed to raise this argument in the trial court. Having reviewed the discussion in the trial court and the trial court's specific statement, "I don't find they are prejudicial," we conclude that the issue was not only raised in the trial court but also addressed. See State v. Blackmer, 149 N.H. 47, 48 (2003) (contemporaneous and specific objection rule based upon principle that trial forums should have opportunity to rule on issues and correct errors before they are presented to appellate court). Because this issue may arise upon remand, we briefly address it. See State v. White, 155 N.H. 119, 128 (2007).

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. N.H. R. Ev. 403. The State contends that the photographs were probative because they supported the victim's claim that she delayed reporting the assaults because she was afraid of the defendant; because the victim was an adult at the time of trial, the State argues, "it was important for the jury to have graphic evidence of the difference, not only in age, but also in size" between the victim and the defendant at the time of the assaults.

The victim testified that her fear in reporting the assaults arose as she approached adolescence and the defendant began to discipline her; her fear continued as an adult because at times she lived with the defendant and her mother and she worried that she would have to leave if she reported the assaults. The victim did not testify that she was in fear of the defendant at the time of the assaults. We conclude, therefore, that the photographs had minimal relevance. See N.H. R. Ev. 401 (evidence relevant if it has tendency to make existence of fact that is of consequence to the determination of action more probable or less probable than it would be without such evidence). The jurors were aware that the victim was a child when the assaults occurred. The risk that admission of the photographs could elicit the sympathy of the jury when evidence of the conduct was juxtaposed with the photographs substantially outweighed whatever limited probative value they had. See State v. Cook, 148 N.H. at 741. We therefore conclude that the trial court erred in admitting the photographs.

Reversed and remanded.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,  
Clerk**